APPENDIX

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22332

JAMES T. BENN, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Review of the Decision of the Tax Court of the United States

(October 6, 1966.)

Before TUTTLE, Chief Judge, BROWN and GODBOLD, Circuit Judges.

PER CURIAM: The issues in this case are purely questions of fact. All of such issues having been resolved by the Tax Court upon evidence credited by it, the judgment appealed from is AFFIRMED.

On Petition for Rehearing and Reconsideration

On Petition for Review of Decision of the Tax Court of the United States (Florida Case)

(November 15, 1966.)

Before TUTTLE, Chief Judge, BROWN and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing and Reconsideration is DENIED.

This petition complains of the fact that, in its prior decision, this Court stated that all the issues were issues of fact, without commenting upon the mixed issues of law and fact, and the legal determinations of the Tax Court, of which it complains. The opinion by this Court is amended to read as follows:

The Tax Court correctly dealt with the legal questions and the mixed questions of law and fact. None of these is of sufficient significance to require an opinion by this Court. All of the remaining issues purely questions of fact. They were decided by the Tax Court upon evidence which it was entitled to credit. The decision by the Tax Court on these issues is not clearly erroneous, and it is therefore

AFFIRMED.

Judgment

Before TUTTLE, Chief Judge, BROWN and GODBOLD, Circuit Judges.

This cause came on to be heard on the petition of James T. Benn, for review of a decision of the Tax Court of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, affirmed.

October 6, 1966

Issued as Mandate: Nov. 23, 1966

TAX COURT OF THE UNITED STATES

Docket No. 78019

JAMES T. BENN, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Filed May 31, 1963

Opinion

KERN, *Judge:* The transcript of the oral testimony given in the trial of this case exceeds 1,800 pages in length and over 230 exhibits were introduced in evidence at the trial. Thirty-nine witnesses testified.

By a careful reading and rereading of the record herein, our memory has been vividly refreshed with regard to the evidence adduced, to the witnesses who testified (many of whom were rather extraordinary characters), and to the demeanor of these witnesses on the witness stand and their manner in giving testimony.

Most of the transactions involved herein were complex. The complexity of many of them was, in our opinion, due to the manner of doing business deliberately chosen by petitioner for the purpose, *inter alia*, of defrauding those with whom he did business (several of whom were themselves not above duplicity) and also the Internal Revenue Service. The unraveling of these complexities was made more difficult by reason of the fact that with regard to many transactions the testimony of witnesses was in conflict with the testimony of other witnesses. Indeed, in many instances, the testimony of a witness was in conflict with receipts and other documents signed by the same witness, occasionally when purportedly under oath, at prior times. Some of the witnesses impressed us as being guileless and gullible, and some as being both gullible and unscrupulous. In either case, many of them fell victims to petitioner's charm and glibness (assisted in some instances, by their own cupidity).

In the face of these difficulties we have done our best to resolve the troublesome questions of fact presented in this case, and our conclusions (44) as to these questions are set out in our Findings of Fact.

Since most of the issues in this case are factual in character, they are disposed of by our Findings. In our opinion, it would serve no useful purpose to repeat them in this Opinion or to discuss the mass of evidence on which they are based.

However, we do feel that it is advisable to discuss briefly a few matters which present mixed questions of fact and law.

During the years involved herein petitioner was engaged in the business of acquiring and disposing of real and personal property. The purchase price of this property was frequently "paid" partly in cash and partly in petitioner's unsecured promissory notes. He maintained no business office or permanent place of residence. He avoided holding title to property in his own name for any extended period, preferring to immediately dispose of the property, or to have it held in the name of one of his "dummy" corporations or that of Margaret I. Bland. From the attendant circumstances and petitioner's conduct, we have concluded that he affirmatively took steps to impede the collection of his obligations and that he had no intention of honoring certain of the promissory notes for which he acquired property at their maturity or at any other time. While petitioner might have been in theory legally liable on these notes, there appeared to be little likelihood that he would ever pay or could be required to pay them. Accordingly, in computing petitioner's cost and expenses with regard to certain of the properties sold by him during these years, we have included these notes only to the extent of their fair market value, which was zero. In giving these notes to the sellers of those properties petitioner has given nothing substantially equivalent to cash, and he is not, as a cash-basis taxpayer, to be permitted to deduct as costs or include in his basis any amount for these notes until such time as they are actually paid. *Eckert* v. *Burnet*, 283 U.S. 140; *Helvering* v. *Price*, 309 U.S. 409; *Baltimore Dairy Lunch* v. *United States*, 231 F. 2d 870; *Quinn* v. *Commissioner*, 111 F. 2d 372; *Skaneateles Paper Co.*, 29 B.T.A. 150; and *Lloyd H. Redford*, 28 T.C. 773.

In those instances where petitioner borrowed money on his notes executed to third parties and paid the cash proceeds to defray costs and expenses directly to the owner of the property, we have included such payments as part of his basis not-with-standing the nonpayment or uncollectibility of such notes. *Edward W. Edwards*, 19 T.C. 275.

The property sold by petitioner was not held for investment purposes, *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263, affirming a Memorandum Opinion of this Court, and it is apparent from the record presented herein that petitioner's modus operandi dictated the immediate sale of property held or acquired by him to customers in the ordinary course of his business. Accordingly, petitioner is not entitled to capital gains treatment on any of the sales in the years involved herein. See *Paul K. Ashby*, 37 T.C. 92; Estate of *Eugene Merrick Webb*, 30 T.C. 1202; *J. Roland Brady*, 25 T.C. 682. Pursuant to the same reasoning, we have also concluded that the loss carryover from 1950 was not a capital loss carryover but was an operating loss carryover.

Respondent contends that a substantial portion of the deficiencies determined for each of the years in issue resulted from petitioner's fraudulent efforts to evade payment of his correct income tax liabilities.

For the years 1951 and 1952, which petitioner contends are closed by the statute of limitations, the burden is on respondent to prove by clear and convincing evidence that petitioner filed for those years false and fraudulent returns with intent to evade tax.

For the years 1951 through 1955, respondent must establish by clear and convincing evidence that some part of the deficiencies determined was due to fraud with intent to evade tax. The fact that for these years the burden of proof with respect to fraud is upon respondent does not relieve the petitioner of his burden of overcoming the presumption of the correctness of the deficiencies in tax for these years as determined by the respondent. See *Snell Isle, Inc.* v. *Commissioner*, 90 F. 2d 481, affirming a Memorandum Opinion of this Court, certiorari denied 302 U.S. 734.

In our opinion the respondent has more than borne the burden of proof imposed upon him with regard to fraud

issued, for all the taxable years, although we have also found that petitioner's understatements of income for the taxable years were in amounts less than those either determined or alleged by respondent.

We have found as a fact that petitioner failed to report a part of his income in each of the taxable years involved herein, that some part of each deficiency was due to fraud with intent to evade tax, and that for the years 1951 and 1952 petitioner's returns were false and fraudulent with intent to evade tax, and that petitioner fraudulently failed to file returns for the years 1953 and 1954. Accordingly, the statute of limitations does not bar the assessment and collection of the deficiencies or additions to tax for the years 1951 and 1952. Since we have found that a part of each deficiency for the taxable years was due to fraud with intent to evade tax, respondent has properly asserted additions to tax pursuant to section 293 (b) of the Internal Revenue Code of 1939 and section 6653 (b) of the Internal Revenue Code of 1954 for each of the taxable years. We have found that petitioner failed to file a Federal income tax return for the year 1953 and petitioner has not shown such failure was due to reasonable cause and not due to willful neglect. Therefore, respondent has properly asserted an addition to tax for this year pursuant to section 291 (a) of the Internal Revenue Code of 1939. Petitioner did not file declarations of estimated tax for the years 1953 and 1954 within the time prescribed by law, and therefore respondent properly imposed the additions to tax pursuant to section 294 (d) (1) (A) of the Internal Revenue Code of 1939. Petitioner has not shown error in respondent's determination that he underpaid his estimated tax for the year 1955, and therefore respondent properly imposed the addition to tax for this year pursuant to section 6654 (a) of the Internal Revenue Code of 1954.

Decision will be entered under Rule 50.

TAX COURT OF THE UNITED STATES

(Caption Omitted)

Decision

Pursuant to the opinion of the Court filed May 31, 1963, and the agreed computation of the tax liabilities filed by the parties; and incorporating herein the facts recited in the computation as the findings of the Court, it is

ORDERED and DECIDED: That there is an overpayment of income tax in the amount of $4,820.41 for the taxable year ended December 31, 1951, which amount was paid after the mailing of the notice of deficiencies;

That there is an overpayment of income tax in the amount of $1,845.40, and an overpayment in the addition to the tax under the provisions of section 293(b) of the Internal Revenue Code of 1939 in the amount of $922.70, for the taxable year ended December 31, 1952, which amounts were paid after the mailing of the notice of deficiencies;

That there are deficiencies in income tax and penalties for the taxable years ended December 31, 1951, 1953, 1954, and 1955, without taking into consideration the jeopardy assessments made in October 1958, as follows:

DEFICIENCIES

		Additions to the tax				
		I.R.C. 1939			I.R.C. 1954	
Year	Income Tax	§ 291(a)	§ 293(b)	§ 294(d)(1)(A)	§ 6653(b)	§ 6654(a)
1951	....	....	$1,276.75	....	....	....
1953	$17,451.66	$4,362.92	8,725.83	$1,737.08		
1954	8,060.69	....	4,030.35	795.27	....	....
1955	52,808.64	....	....	....	$26,404.32	$151.34

That there are no deficiencies in the additions to the tax for the years 1953 and 1954 under the provisions of section 294(d)(2) of the Internal Revenue Code of 1939.

Judge

Entered: April 3, 1964

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the agreed computation of the parties, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein, pursuant to the statute in such cases made and provided.

Petitioner

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